



Kimathi v Littlewood & 4 others (Registered Trustees of Nanyuki Sports Club) & another (Cause E010 of 2020) [2023] KEELRC 1697 (KLR) (14 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1697 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E010 OF 2020
ON MAKAU, J
JULY 14, 2023

BETWEEN

ASHFORD KIMATHI CLAIMANT

AND

**MICHAEL LITTLEWOOD, PETER M. WAWERU, BENSON MUTHIORA,
HARRIET MWIRIGI & SAJID BHAT (REGISTERED TRUSTEES OF NANYUKI
SPORTS CLUB) 1ST RESPONDENT**

NANYUKI SPORTS CLUB 2ND RESPONDENT

JUDGMENT

1. By the Amended Memorandum of Claim, the claimant alleges that he was employed by the respondents as General Manager/Club Secretary from 10th June, 2019 under a three (3) years renewable contract. His salary was Kshs.150,000 per month. His services were however terminated vide the letter dated 2nd September, 2020 for alleged misconduct. He denied any wrongdoing and averred that the termination was unfair. Therefore brought this suit seeking the following reliefs:
 - a. An order that the claimant was unfairly and illegally terminated from employment.
 - b. An order compelling the respondent to pay the claimant unpaid salaries for the months of July, August and September 2020 amounting to Kenya Shillings 360,000/= (Three hundred and sixty thousand).
 - c. An order compelling the respondent to pay the claimant salaries for the remainder of the contract as per the Employment contract amounting to Kenya Shillings 3,450,000/= (Three million, four hundred and fifty thousand).



- d. An order compelling the respondent to pay the claimant leave allowance for 2 months in lieu of the contract amounting to Kenya Shillings 300,000/= (Three hundred thousand).
 - e. General damages and interest from the date of filing this suit.
 2. The respondent averred in their Amended Response that they lack capacity of being sued and the suit is bad in law. They further denied that they dismissed the claimant unfairly and unlawfully. They averred that they served the claimant with a show cause letter dated 24th August, 2020 and was accorded a disciplinary hearing on 26th August, 2020 before a committee. He was then found guilty of the charge of failing to record, maintain and keep proper custody of the minutes of the Committee and Sub-Committee Meetings; and failing to safeguard the properties of the club among others.
 3. The respondents denied that it failed to pay the claimant salary arrears of Kshs.360,000 and averred that the claimant agreed to a salary cut of 40% which reduced his salary to Kshs.90,000. They further averred that the claimant failed to comply with the termination letter on the issue of clearance before payment of his terminal dues. Therefore the respondent prayed for the suit to be dismissed for lack of merits.

Evidence

4. The claimant testified as CW1. He adopted his written statement dated 19th February, 2021 as his evidence and produced as exhibits the documents in the list dated 25th November, 2020 and 9th February, 2021. In brief he reiterated that he was employed as the General Manager Nanyuki Club and his duties included Finance and Human Resources. He started from 10th June, 2019 for a 3 years renewable contract but it was terminated prematurely. Before then he had taken his normal leave from 2nd June, 2020 to 3rd July, 2020 but due to death of his sister the leave was extended to 20th July, 2020 when he resumed. However, he was given 14 days forced leave to pave the way for an audit into some lost properties and cash.
5. After the lapse of the 14 days, the leave was further extended by 14 days to allow the audit to be completed. On 4th August 2020, he was called by the club Chairman to collect a letter which was directing him to resume duty on 6th August, 2020 and he complied. He worked until 20th August, 2020 when he was served with a show cause letter and he responded. Thereafter he was called for a hearing but he was not allowed to bring a fellow employee of his choice. His response to the show cause letter was also not discussed. Therefore he was not given a fair hearing and his dismissal was not fair.
6. He contended that his July salary was paid less 40% while August and September salary was never paid despite the dismissal letter stating that he would be paid salary up to 11th September, 2020. He contended that he fully handed over.
7. He maintained that the reasons for the dismissal were not justifiable since external auditors had audited the club's books and found no loss. He contended that no audit report was filed despite him having been sent on forced leave. Further, the club has a robust operating system containing all the club's data but no report was given to the court from the said data. Therefore he prayed for the reliefs sought in his claim.
8. On cross-examination he contended that he has sued the registered trustees of the Nanyuki Sports Club but admitted that he did not have the certificate of registration of the trustees. He admitted also that he never worked for the club after the termination in September 2020. He further admitted that he stated in his response to the show cause letter that the club had no money and it was struggling. He



maintained that his salary was reduced by 40% while on leave. He also denied the allegation that he was the one who reduced the salary for the other staff.

9. He admitted that he responded to the show cause letter and attended disciplinary hearing. However, he was not heard. He contended that no witness told the disciplinary committee that he authorized them to take away club property. He stated that he appealed against the dismissal but he was not heard.
10. He admitted that he signed the Gate Passes for pumpkin, spinach plants and lawnmower to be taken away from the club contending that paragraph 16 of his contract of employment and Article 48, 49, 50 and 51 of the Club's Constitution gave him authority to do that. Finally he contended that he has not secured any other employment since his dismissal by the respondents.
11. Mr. Joseph Mwangi, Vice Chairman of Nanyuki Sports Club testified for the respondents as RW1. He adopted his written statement dated 20th January, 2021 as his evidence in Chief and produced as exhibits bundle of documents filed with the defence and further bundle in the list of documents dated 16th February, 2021.
12. In brief RW1 stated that he chairs the HR and Labour Sub-Committee of the Nanyuki Sports Club, which is a society registered under the Societies Act Cap 208. He referred to the certificate of exemption produced in the list of the respondent's exhibits. He testified that he served the claimant with a show cause letter and he replied. Thereafter the claimant was accorded a hearing as per the minutes produced as defence exhibit.
13. He testified that the reasons for the action were set out in the show cause letter as;
 - a. Unlawfully neglected to perform his duties under the contract.
 - b. Failing to safeguard assets of the employer.

He contended that the reasons were valid since the claimant had signed Gate Passes authorizing two lawn mowers and projector to be taken away from the Club. He maintained that the claimant had no authority to give out his employer's assets.

14. He denied the claim for Kshs.360,000 salary contending that the claimant was paid all his salary for July 2020 less the agreed salary cut of 40% due to Covid-19 pandemic. That the said pay cut applied to all the management staff and the claimant is the one who implemented the pay cut as the Club Manager. He admitted the claim for August and September salary subject to the claimant complying with the instructions to clear before all terminal dues are paid.
15. RW1 further denied the claim for salary for the unserved contract term and contended that the claimant never rendered any services for the said period. Likewise the claim for leave for the same period was denied since the claimant did not render service after the dismissal. He prayed for the claimant's suit to be dismissed with costs.
16. On cross-examination, RW1 contended that the contract for 3 years was subject to termination clause. He admitted that the claimant's salary was Kshs.150,000 per month subject to statutory deductions. He further admitted the claimant's salary for July 2020 was cut by Kshs.60,000 and contended that the salary for all the juniors was cut from May 2020. He contended that the claimant was present as the Club Secretary when the pay cut for the management was discussed in the month of July 2020. However, on further cross examination RW1 did not produce any minutes to support the above allegation. He also did not have any document to show that the claimant agreed to the said pay cut.



17. RW1 admitted that the claimant had previously complained about being micro-managed. He confirmed that no report of the audit done while the claimant was on the forced leave, was produced in court. However, he maintained that the Gate Passes he produced, were evidence that property was lost.
18. As regards the disciplinary hearing, RW1 contended that he recorded the minutes but he never gave the claimant to confirm whether they were correct. He admitted that he did not rebut the claimant's allegation in his statement that the minutes did not reflect the correct deliberations.

Submissions

19. It was submitted for the claimant that the terms of his fixed term contract was varied by the employer without consultation by reducing his salary for July 2020 contrary to Section 10(5) of the *Employment Act*. It was submitted that RW1 confirmed that the said salary cut of 40% followed a resolution by the Club's Committee in July 2020. Reliance was placed on the case of Bakery Confectionary Food Manufacturing and Allied Workers Union (K) v Kenafric Industries Ltd [2021] eKLR where the procedure of salary cut was discussed. It was also observed that RW1 stated that the minutes of the meeting where the resolution was passed were presented to court. Likewise, no other document amending the claimant's contract was present in court. RW1 testified that the minutes were missing because the claimant had failed to record the minutes hence part of the disciplinary case.
20. However, it was submitted for the claimant that the above testimony by RW1 contradicted the documentary evidence filed by the respondent because indeed the minutes about the pay cut have been filed by the respondents in their further list of documents dated 16th February, 2021 pages 14-17. Further the said minutes are incomplete as there is no signatory page to prove that the minutes were proposed, seconded, confirmed and signed. Consequently, it is the claimant's case that the said minutes lack mandatory aspects of a legal document and therefore it is incompetent and inadmissible. For emphasis, Section 35(4) of the *Evidence Act* was cited. Further reliance was placed on the case of Cargill Kenya Ltd v Wilson Onywoki Nyakeruma [2021] eKLR where the court held that unsigned minutes were not authenticated.
21. In this case it is the claimant's case that the decision to reduce his salary was unilateral and illegal. Therefore he urged the court to find that he is entitled to the unpaid salary.
22. As regards the dismissal from employment, it was submitted that the same was not in accordance with Section 41 of the *Employment Act* and therefore it was procedurally unfair. For emphasis reliance was placed on Standard Group Ltd v Jenny Luesby [2018] eKLR and Gilbert Mariera Makori v Equity Bank Ltd [2016] eKLR.
23. It was submitted that the minutes of the disciplinary hearing were unilaterally made with intention to mislead the court as they do not reflect what transpired during the hearing.
24. In addition it was submitted that the reasons for the dismissal were not valid and fair. It was urged that the respondents have failed to discharge the burden of proving a valid reason as was held in Evans Kamandi Misango v Barclays Bank of Kenya Ltd [2015] eKLR. It was submitted specifically that no evidence was presented to prove that the claimant delayed and failed to compile minutes for presentation to the Committee Members for mandatory approval citing Covid-19 pandemic as an excuse. It is the claimant's case that he handed over all the minutes when clearing from the Club and the clearance form was witnessed by David and Simon who have not been called as witnesses to rebut that fact.
25. As regards the second reason for the dismissal, that is, signing and authorizing signing of Gate Passes that led to theft of Club property, it was submitted that the respondents have not produced any report



- of the annual audit or just an inventory of assets to prove that property was lost as alleged. Further it was submitted that no evidence was tendered to prove that while the claimant was on leave, he instructed other officers to sign gate passes. In that regard the allegation against him was seen as discriminatory since the said officers who signed off the property of the Club were not subjected to disciplinary action.
26. It was further submitted that the allegation that the claimant failed to update records of the staff and trainee contracts and payroll was never discussed during the disciplinary hearing. Further the said role falls within the docket of the Accountant who was not subjected to disciplinary action.
 27. As regards award of accumulated leave of 108 days to Antony Nderitu, it was submitted that the claimant had denied the allegation and maintained that Mr. Nderitu had forged his signature to give himself the said leave days. It was submitted that the leave form has not been produced as exhibit herein for the court to scrutinize.
 28. Further it was submitted that the allegation that the claimant insulted, disrespected and insubordinated the Club Committee was not in the hearing notice and he was not given any opportunity to rebut it. For the reasons above, it was submitted that the reasons for the dismissal were baseless and he is entitled to the reliefs sought.
 29. The respondent on the other hand submitted, that the suit against them is untenable since they are not legal entities. It was submitted that the respondents have filed a certificate of exemption from registration under Section 10 of the Societies Act Cap 108 Laws of Kenya. Accordingly, it was submitted that the 2nd respondent is only a Society within the meaning of Section 9 and 10 of the Societies Act and not a legal person and it can only be sued through its elected officials. Therefore it was argued that the suit against the 2nd respondent is a non-starter.
 30. As regards the 1st respondent, it was submitted that it is also untenable and a non-starter because there is no certificate of registration of the trustees produced as exhibit. For emphasis, reliance was placed on Kenya Power & Lighting Company v Benzenga Holdings Ltd T/a Wyco Paints [2016] eKLR to urge the court to hold that the 1st respondent was a mere name with no legal existence and as such no action can be maintained against it as a non-existent person.
 31. Further reliance was placed on Geoffrey Ndirangu & 5 others v Chairman of Mariakani Jua Kali Association & 2 others [2015] eKLR where the court held that a society is not a legal person capable of being sued in its name and therefore it has to be sued through its officials in their respective names as opposed to titles.
 32. As regards the alleged unfair termination, it was submitted that the claimant was served with a show cause letter and thereafter accorded a disciplinary hearing. Further the reason for the termination was valid because after the disciplinary hearing he was found guilty of gross misconduct. Besides he was not executing his duties properly in that he failed to keep minutes of the management committee, and he also allowed Club's property to be stolen.
 33. Reference was made to the decision in the case of Kennedy Maina Mirera v Barclays Bank of Kenya Ltd [2018] eKLR where the court held that burden of proof in any complaint of unfair termination rests with the employee while the employer has the burden of justifying the reason for the termination.
 34. Consequently the court was urged to find that the claimant has not adduced prima facie evidence to show that he was unlawfully dismissed but the respondent has demonstrated a valid reason for the termination and that a fair procedure was followed.
 35. As regards the reliefs sought, it was submitted that the claimant is not entitled to any because first the claim for unpaid salary of Kshs.360,000 has not been proved; that the minutes of Special Committee



held on 1st June, 2020 is proof that the claimant's salary be cut by 30%; and that the claimant was present as the Club Secretary and General Manager and he is the one who suggested the salary cut since the Club was not performing due to Covid-19 pandemic.

36. It was submitted that as per the pay slips for May to September 2020 produced, the salary for all the employees were accordingly reduced from July 2020 onwards. The claimant's reduced pay was Kshs.74,250 net of statutory deductions. It was submitted that the only outstanding salary is for August 2020 being Kshs.74,250 to be paid after handing over all Club's assets as directed through the dismissal letter.
37. Finally, it was submitted that the claim for salary and leave for the unserved contract period must fail in the face of the Court of Appeal decisions in *Elizabeth Wakiunyi Kibe v Telkom Kenya Ltd* [2014] eKLR where it was held that the prayer for expected remuneration that the appellant would have earned till retirement was properly rejected by the trial court.

Issues for Determination

38. There is no dispute that the claimant was employed by Nanyuki Sports Club as its Secretary and General Manager under a three years renewable contract from 10th June, 2019. There is further no dispute that the contract was terminated prematurely vide the letter dated 2nd September, 2020. The issues for determination are:
 - a. Whether the suit is a non-starter for want of competent respondents.
 - b. Whether the reasons for the termination were valid and fair.
 - c. Whether fair procedure was followed.
 - d. Whether the reliefs sought are merited.

Respondents' Legal Capacity

39. The respondents' case is that they lack legal capacity to sue or be sued. They argued that the 2nd respondent is an unregistered society having been issued with a certificate exempting it from registration. They maintained that a society ought to be sued through the names of its elected officials and not titles.
40. The claimant maintained that the respondents are entities with existence and that is why they received court process and entered appearance without any protest.
41. I have carefully considered the evidence, submissions and even the ruling by which leave was granted to amend the Statement of Claim. The respondents in their response to the amended claim denied that they are legal persons capable of being sued. It was incumbent upon the claimant to adduce evidence to prove that the 1st respondent is a registered trust under the Trustees (perpetual) Succession Act – and that the 2nd respondent was a body corporate capable of being sued in its name. The claimant did not discharge that burden and that is why the respondents submit that the suit is a non-starter.
42. In the case of *Kenya Power & Lighting Company v Benzenga Holdings Ltd T/a Wyco Paints* [2016] eKLR, the Court of Appeal stated that no suit can be brought against a non-existent person. The court held that:

“This principle was emphasized as long as 1923 by Bankes L, J in *Banque Internationale De Commerce* (supra), which was subsequently in 1959 cited with approval by Templeton, J



of the then Supreme Court of Kenya in *Fort Hall Bakery Supply Co. v Fredrick Muigai Wangoe* [1959] EA 474, who said:

“the party seeking to maintain the action is in the eye of our law no party at all but a mere name only, with no legal existence ... A non-existent party cannot sue, and once the court is made aware that the plaintiff is non-existent, and therefore incapable of maintaining the action, it cannot allow the action to proceed ... Since a non-existent plaintiff can neither pay nor receive costs, there can be no order as to costs.”

43. In the case of *Geoffrey Ndirangu & 5 others v Chairman of Mariakani Jua Kali Association & 2 others* [2005] eKLR the court held that:

“The law on suits by or against Societies is well settled. A society not being a legal person cannot sue or be sued in its name. It has to sue or be sued through its officials ... And the officials have to be named. Titles like Chairman, Secretary and or Treasurer cannot be used as those are not legal persons either.”

44. The claim against the 2nd respondent is not filed through its elected officials. The correspondences filed by the claimant as exhibits confirms that there is a Committee other than the alleged registered trustees who manages the Club’s day to day matters. RW1 is the Vice Chairman of that Committee while Mr. Kuldip Hunjan is the Chairman. The said elected officials have not been joined in the suit despite the express pleadings filed by the respondents that the 2nd respondent is not a legal person capable of being sued in its own name. Based on the cited authorities, I agree with the respondents that the suit against the 2nd respondent is a non-starter and no valid decree can issue against it.

45. As regards the 1st respondent I have already observed that there is no evidence that the five persons sued as registered trustees are first and foremost the trustees elected under Rule 4(a) of the Clubs Rules. Secondly there is no proof that the said persons are registered as trustees for the Club within the meaning of Section 9 and 10 of the Trustees (Perpetual) Succession Act capable of being sued on behalf of the Club. There is also no evidence that the said trustees are the correct officials to sue on behalf of the Club even without a registered trust. Consequently, I also find that the suit against the 1st respondent is a non-starter and therefore fatally incompetent.

46. In view of the above matter, this court sees no need of going to the merits of a suit since I would be proceeding against nobody. Therefore I strike out the suit with a rider that the claimant is at liberty to file a proper suit before the limitation period of three (3) years lapses. There shall be no order as to costs because there is no competent respondent capable of being awarded benefit or being condemned by a decree of the court.

DATED, SIGNED AND DELIVERED AT NYERI THIS 14TH DAY OF JULY, 2023.

ONESMUS N MAKAU

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU



JUDGE

